No. 14-AA-1086

DISTRICT OF COLUMBIA COURT OF APPEALS

JACQUELINE LYNCH,

Petitioner,

v.

MASTERS SECURITY,

Respondent.

On Petition for Review from the Office of Administrative Hearings
(2013-DOES-00196)

BRIEF OF PETITIONER

Drake Hagner (No. 1004674)*
Jonathan Levy (No. 449274)
Legal Aid Society of the District of Columbia
1331 H Street, N.W., Suite 350
Washington, DC 20005
Telephone: (202) 628-1161
Counsel for Petitioner Jacqueline Lynch

**Presenting oral argument*

STATEMENT PURSUANT TO RULE 28(a)(2)(A)

The parties in this case are Jacqueline Lynch, the unemployment claimant and petitioner, and Masters Security, her former employer and respondent. Before the Office of Administrative Hearings, Ms. Lynch was represented by Tonya D. Love of the AFL-CIO Claimant Advocacy Program and Masters Security was represented by its Vice President of Operations, Bernard Battle.

On May 16, 2013, Ms. Lynch filed her first Petition for Review to this court where she was represented by Drake Hagner, Jennifer Mezey, and John C. Keeney, Jr., of the Legal Aid Society of the District of Columbia. Edward R. Noonan and Jeffrey P. Brundage of Eckert Seamans Cherin & Mellott, LLC represented Masters Security. No intervenors or *amici* appeared.

After a remand to the Office of Administrative Hearings without any additional proceedings, the Administrative Law Judge issued a Final Order After Remand on August 29, 2014. Ms. Lynch timely filed a second Petition for Review on September 24, 2014. In this second appeal, Ms. Lynch is represented by Drake Hagner and Jonathan Levy of the Legal Aid Society of the District of Columbia. Edward R. Noonan and Jeffrey P. Brundage of Eckert Seamans Cherin & Mellott, LLC again represent Masters Security. No intervenors or *amici* have appeared.

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QUESTION PRESENTED

Masters Security terminated Ms. Lynch for her one-time mistake of leaving her service weapon in the restroom for fifteen minutes when she was distracted by her mother's health issues. The question presented is whether Ms. Lynch's mistake was deliberate, willful, or intentional, as is required to support a finding of gross misconduct; and, if not, whether this mistake, committed without any malice or bad faith, was made with the equivalent of intentionality, as is required to support a finding of simple misconduct.

STATEMENT

Factual Background

For five years, Jacqueline Lynch was employed by Masters Security as a supervisory armed security officer. Final Order After Remand, Aug. 29, 2014 ("Order") at 2 (App. A16); Transcript of the February 25, 2013 Hearing ("Tr.") at 45, Record at Tab 8 (App. A33). At the time of her termination, she served at the United States Department of Health and Human Services headquarters building. Order at 2 (App. A16). Her responsibilities included checking visitor identification, sending visitors through a weapons detector, and protecting employees, visitors, and property. *Id.* Ms. Lynch had worked in security services for 28 years and, until the morning of January 14, 2013, had never left a weapon unsecured. Tr. 61-62 (App. A42-43).

On January 14, 2013, Ms. Lynch returned to work after taking time off to care for her mother, who had been in the hospital for over a week and had just been discharged from a rehabilitation program. Tr. 59-60 (App. A40-41). Ms. Lynch arrived at work shortly before her 8:00 a.m. shift and retrieved her company-issued firearm. Order at 2-3 (App. A16-17). Before assuming her post in the front lobby, she went to the restroom located in a corridor behind the lobby. Order at 3 (App. A17). This particular restroom, while accessible to the public, was used

by employees and often went unnoticed by building visitors due to its location in a back hallway. Tr. 48-50 (App. A36-38); *see also* Order at 3 (App. A17). Ms. Lynch entered the restroom; went into a bathroom stall; and, following her normal practice, removed her firearm from its holster and placed it on the bathroom stall shelf. Order at 3 (App. A17); *see* Tr. 73-74 (App. A48-49).

In order to use the toilet, a female officer must remove her firearm because it is attached to a holster on her belt. *See* Tr. 58 (App. A39); *see also* Tr. 70-71 (App. A45-46). Masters Security had no policies or protocol directing a female officer on how or where to place her firearm while using the restroom. Tr. 71, 75 (App. A46, A50); *see also* Final Order, Mar. 11, 2013 ("Pre-Remand Order") at 4 (App. A4). Without any guidance from Masters Security, Ms. Lynch had previously determined that placing the gun on the shelf was the safest and most practical way to secure her weapon while in the stall. *See* Order at 3 (App. A17); *see also* Tr. 73-75 (App. A48-50). The other alternatives were unacceptable. Placing her firearm on the bathroom floor or hanging her belt from the upper hook of the stall door would be less safe because another person could reach into the stall and take the gun. Order at 3 (App. A17); Tr. 73-76 (App. A48-51). Attaching the gun to a belt and hanging it around her neck – as Masters Security suggested much later – would have been unrealistic and "bizarre." *See* Tr. 76-78 (App. A51-53). Ms. Lynch testified without contradiction that placing the gun on the stall shelf was "what every woman [officer] does" in the restroom. Tr. 73 (App. A48); *see also* Tr. 71, 74, 76 (App. A46, A49, A51).

On that day, when Ms. Lynch finished using the toilet, she failed to re-holster her firearm before exiting the stall. Order at 3 (App. A17). This was the first time that she had left her firearm in the restroom, Tr. 61-62 (App. A42-43), as she normally double-checked to make sure she had possession of her firearm before leaving. Order at 3 (App. A17); Tr. 47 (App. A35).

However, this was not the first time a gun had been left in the restroom: Ms. Lynch had previously found a weapon left in the restroom by Irene Burton, one of Ms. Lynch's coworkers. Order at 2 (App. A16); *see* Tr. 23-24 (App. A26-27). Ms. Lynch, however, did not report the incident, and Ms. Burton was not disciplined. Order at 2 (App. A16).

Ms. Lynch explained that she failed to check whether she had her weapon when she left the restroom on the single occasion at issue here because she was preoccupied with worry for her mother. Order at 3 (App. A17); *see also* Tr. 46 (App. A34) ("I had a lot of things on my mind . . . My mother has been very ill."); Pre-Remand Order at 3 (App. A3) ("Claimant . . . was so pre-occupied with worry about her mother that she failed to [check to see that she had re-holstered her weapon] on this occasion."). As Ms. Lynch testified, "I went into the restroom, used it and as I head out, I usually, I always touch my weapon before I come out of the restroom . . . [my mother's illness] was on my mind, you know, and I didn't even think about that. I didn't do it." Tr. 47 (App. A35).

Fifteen minutes after Ms. Lynch exited the restroom, Ms. Lynch's co-worker Ms. Burton entered the same bathroom stall and found the weapon. Order at 3 (App. A17); Tr. 16 (App. A25). She brought the firearm to Ms. Lynch's supervisor, Timothy Nelson, who in turn identified the weapon as Ms. Lynch's by consulting the employer's weapons inventory sheet. Order at 3 (App. A17); Tr. 26-27. Mr. Nelson "called Ms. Lynch up to the arms room. [He] gave her the weapon back, and [he] told her go back to her post." Tr. 27. However, another coworker contacted Bernard Battle, Mr. Nelson's supervisor, to report the incident, and Mr. Battle instructed Mr. Nelson to send Ms. Lynch home and to write up a personnel action form on the incident. Order at 3 (App. A17); Tr. 27-29. Mr. Nelson complied and recommended "suspension, pending termination." Tr. 31-32. Vice President Kristine Nichols later terminated

Ms. Lynch for leaving her service weapon in a public restroom for fifteen minutes. Order at 3 (App. A17).

Pre-Remand Administrative Proceedings

Ms. Lynch applied for unemployment benefits. The District of Columbia Department of Employment Services disqualified her from benefits. Determination by Claims Examiner, Record at Tab 1, Exhibit 300. The basis of the denial was discharge for gross misconduct because "[Ms. Lynch] violated the company's weapons handling policy by leaving her loaded gun in the ladies room unsecured." *Id.* Ms. Lynch timely appealed the denial to the District of Columbia Office of Administrative Hearings. Pre-Remand Final Order at 2 (App. A2).

Administrative Law Judge (ALJ) Arabella W. Teal conducted a hearing on February 25, 2013 and issued a Final Order on March 11, 2013, concluding that Ms. Lynch was terminated for gross misconduct. Pre-Remand Final Order at 5 (App. A5). The ALJ determined that Ms. Lynch was fired for "leaving a loaded gun in a publicly-accessible restroom for 15 minutes because she was preoccupied." *Id.* at 4 (App. A4). The ALJ dismissed the employer's argument that Ms. Lynch was terminated for violation of a company rule because she found no credible evidence of any policy requiring Ms. Lynch to place her gun elsewhere in the stall, as required to establish a rule violation under 7 DCMR § 312.7. Pre-Remand Final Order at 4 (App. A4).

On March 15, 2013, Ms. Lynch filed a Motion for Reconsideration challenging the ALJ's legal conclusion that Ms. Lynch left her firearm in the bathroom intentionally, willfully, or deliberately, as is required for a finding of gross misconduct. Motion for Reconsideration at 3, Record at Tab 10. The ALJ denied the Motion for Reconsideration on May 1, 2013. Order

Denying Motion for Reconsideration at 1 (App. A9).[1] In the denial order, the ALJ stated that whether Ms. Lynch unintentionally left her gun unattended was "not the point." *Id.* Instead, according to the ALJ, Ms. Lynch's knowledge that she was "distracted by worry," and that "being on duty required her to . . . safeguard . . . her loaded weapon," was sufficient to find that she was "consciously reckless in much the same way they would have been had she been distracted or unable to properly pay attention to core job duties because she was sleepy, had taken medication, or was engaged in a personal conversation." *Id*. at 1-2 (App. A9-10). The ALJ concluded that the intentionality requirement for gross misconduct was satisfied because Ms. Lynch was aware that worry and distraction could impair her job performance and was thus "consciously reckless." *Id.* at 2 (App. A10) (citing *Capitol Entm't Servs., Inc. v. McCormick*, 25 A.3d 19, 25-26 (D.C. 2011)).

Ms. Lynch timely filed a first petition for review with this court on May 16, 2013.

Prior Proceedings Before This Court

On June 26, 2014, after briefing and oral argument, this court reversed the ALJ's decision, holding that misconduct could not be based on an action (Ms. Lynch's decision to come to work while distracted) that was not the basis of her termination from employment (leaving her firearm unattended in the restroom). *Lynch v. Masters Sec.*, 93 A.3d 668, 677 (D.C. 2014). This court remanded for a proper determination regarding misconduct, with instructions to:

> consider whether the existing record reveals that Masters Security proved by a preponderance of the evidence that Sergeant Lynch's act of leaving her weapon in

[1] The Order Denying Motion for Reconsideration is paginated non-sequentially (4, 2, 3, 4, 4, 6). This brief cites to that Order as if its pagination were standard ("1, 2, 3, etc."). All citations to the Order include a parallel citation to the Petitioner's Appendix.

> a publicly accessible place — standing alone and regardless if doing so violated her employer's stated rule — is the kind of gross negligence that we have equated with intentionality due to the serious harm that could ensue, that is, whether the stated act constitutes "highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent."

Id. at 677 (quoting *Capitol Entm't*, 25 A.3d at 28). In a concurring opinion, Judge Fisher stated that if, under "current statutes and regulations," "ordinary negligence" coupled with a sufficiently "high risk of injury" is not sufficient to find disqualifying misconduct, those statutes and regulations "should be amended to do so." *Lynch*, 93 A.3d at 677-78 (Fisher, J., concurring).

Final Order After Remand

On August 29, 2014, the ALJ issued a Final Order After Remand again disqualifying Ms. Lynch from benefits due to gross misconduct. Order at 1-8 (App. A15-22). The ALJ found that Ms. Lynch's intentional placement of her firearm on the bathroom shelf was not at issue as it was a reasonable place to put the weapon in the absence of any employer guidelines to the contrary and not the basis for her termination. *Id.* at 5 (App. A19). Instead, the ALJ described the dispositive conduct as "fail[ing] to pick up her weapon again, [and] fail[ing] to check for it when leaving the bathroom." *Id.* at 6 (App. A20). The ALJ found that, unlike the initial placement of the gun, these dispositive actions were neither intentional nor conscious. *See id.* at 6 (App. A20) ("There is nothing in the record to suggest that [Ms. Lynch] placed her loaded gun on the shelf with the intent to leave it behind"); *id.* at 6-7 (App. A20-21) (finding no intent, maliciousness, or "evil design" behind Ms. Lynch's failure to retrieve her gun); *id.* at 7 (App. A21) ("[Ms. Lynch] did not notice that [her gun] was missing from her belt.").

The ALJ stated that she could find misconduct despite the "lack of intentionality" on Ms. Lynch's part because "[w]hen determining willfulness or recklessness, the case law suggests that

I should consider whether a claimant 'proffers evidence suggesting that such actions were *sufficiently excusable* to negate willfulness or deliberateness [required for a finding of misconduct], the burden shifts back to the employer to disprove such evidence.'" Order at 6 (App. A20) (alterations in original, quoting *Badawi v. Hawk One Sec., Inc.*, 21 A.3d 607, 614 (D.C. 2011)). The ALJ then concluded that Ms. Lynch's distraction did not negate her "reckless and conscious disregard of the harm to Employer's interests of failing to remove her loaded weapon from an unsecured and publicly accessible bathroom," and that she had therefore committed disqualifying misconduct. Order at 7 (App. A21). Finally, turning to the type of misconduct (gross or simple), the ALJ stated that Ms. Lynch's conduct was "sufficiently egregious to require a finding of gross misconduct," despite the fact that it was "not malicious or intentional." *Id.*

The ALJ determined that Ms. Lynch remained disqualified from benefits on August 29, 2014. Order at 8 (App. A22). Ms. Lynch timely filed her second petition for review with this court on September 25, 2014.

STANDARD OF REVIEW

"Whether a fired employee's actions constituted misconduct, gross or simple, is a legal question, and our review of an agency's legal rulings is *de novo*." *Odeniran v. Hanley Wood, LLC*, 985 A.2d 421, 424 (D.C. 2009) (internal citation and quotation marks omitted). Factual findings are reviewed under the substantial evidence standard. *E.g., Rodriguez v. Filene's Basement, Inc.*, 905 A.2d 177, 180 (D.C. 2006).

SUMMARY OF THE ARGUMENT

In this second appeal, the ALJ erred by totally disqualifying Ms. Lynch from unemployment benefits for a regrettable but unintentional one-time mistake. It is undisputed that Ms. Lynch was terminated for accidentally leaving her service weapon in a bathroom stall on a day when she was distracted by worry about her ailing mother. The ALJ repeatedly emphasized that Ms. Lynch acted without intent or other similarly culpable mental state, such as malice or evil design. Those findings, which are correct and supported by the evidence, preclude a finding that Ms. Lynch's behavior meets the regulatory definition of gross misconduct, which requires proof of a willful, deliberate, or intentional bad act. 7 DCMR § 312.3 (Addendum of Statutes and Regulations ("Add.") at 2). For this reason, the ALJ's decision must be reversed.

Masters Security's attempt to prove simple misconduct fails for a similar reason. Simple misconduct requires proof of the claimant's intent to do wrong, a mental state defined as intent or its equivalent – conscious disregard amounting to recklessness. A mere mistake, or ordinary negligence, is insufficient to justify cutting the lifeline of unemployment benefits. Here, again, the ALJ's repeated and correct findings of fact that Ms. Lynch acted without intent or a culpable mental state, coupled with the fact that the reason for her mistake was Ms. Lynch's distraction over her mother's health, rather than any malicious reason, make it impossible to prove not only intent itself but also any equivalent of intent.

Although this court has never found this "equivalent to intent" mental state to exist in the unemployment insurance context, it has made two things clear. First, ordinary negligence is never the equivalent of intent. And second, more culpable mental states, such as gross negligence and recklessness, can be equivalent to intent only when they evidence a high degree of culpability, including wrongful intent and evil design. Here, there is only ordinary

negligence: a one-time mistake in which Ms. Lynch forgot to do something she routinely did because she was distracted with worry about her mother's health. This action cannot constitute gross negligence because it is not such an extreme departure from the standard of care to give rise to an inference of a culpable mental state. Accordingly, there can be no equivalence to intent and therefore no simple misconduct here.

The ALJ here was understandably concerned with the real danger posed by Ms. Lynch's conduct. That danger constituted valid grounds for Ms. Lynch to lose her job. But unemployment insurance benefits are available to those justifiably fired for creating dangerous situations – even highly dangerous situations – by innocent mistake. Such benefits may only be taken away when a claimant acts with one of the specified culpable mental states, none of which was present here. Here, Ms. Lynch was distracted on her first day back at work by her mother's health problems, and that distraction led her to unintentionally forget her gun in the restroom for about 15 minutes. In the absence of any mental state equivalent to intent, Ms. Lynch cannot be found to have committed even simple misconduct and is entitled to receive the limited safety net of unemployment insurance benefits.

ARGUMENT

I. The ALJ erred as a matter of law in finding that Ms. Lynch's single, unintentional act constituted gross misconduct.

a. Actions cannot constitute gross misconduct unless they are willful, deliberate, or intentional.

The ALJ's determination that Ms. Lynch committed gross misconduct is a legal conclusion, reviewable by this court *de novo*. *E.g.*, *Odeniran v. Hanley Wood*, LLC, 985 A.2d 421, 424 (D.C. 2009). When reviewing decisions made under the Unemployment Compensation Act, this court interprets those provisions to further the statutory purpose of "minimizing the economic burden of unemployment." *Badawi v. Hawk One Sec., Inc.*, 21 A.3d 607, 616 (D.C.

2011); *Capitol Entm't Servs., Inc. v. McCormick*, 25 A.3d 19, 27 (D.C. 2011) (The Unemployment Compensation Act must be "liberally and broadly construed."). This is so because of the crucial importance of the unemployment benefit system; this temporary (and partial) wage-replacement benefits both the individual worker and the economy at large. *See Johnson v. So Others Might Eat*, 53 A.3d 323, 326 (D.C. 2012) (statutory purpose is to "protect employees against economic dependency caused by temporary unemployment and . . . reduce the need for other welfare programs") (internal citations and quotations omitted). Thus, by law, a terminated employee is presumed entitled to benefits and the employer bears the sole burden of proving disqualifying misconduct. 7 DCMR §§ 312.2, 312.8 (Add. 2, 3). No matter how justified an employer's reason for termination may be, the safety net of unemployment benefits remains available unless the employer proves all elements of misconduct. *See, e.g.*, *Wash. Times v. District of Columbia Dep't of Employment Servs.*, 724 A.2d 1212, 1218 (D.C. 1999) ("The fact that an employee's discharge appears reasonable from the employer's perspective does not necessarily mean that the employee engaged in misconduct.") (citations omitted).

A critical element of any misconduct determination is proof that the claimant acted with a heightened mental state of culpability or intent to do wrong. *See Bowman-Cook v. Wash. Metro. Area Transit Auth.*, 16 A.3d 130, 135 (D.C. 2011) ("implicit in the definition of 'misconduct' is that the employee *intentionally* disregarded the employer's expectations for performance") (citation omitted). The Unemployment Compensation Act does not define the level of intentionality required for "gross misconduct" or "other than gross misconduct" (commonly known as simple misconduct), but instead directs the agency to clarify these terms. *See* D.C. Code § 51-110 (b)(3) (Add. 1). The regulations describe gross misconduct as:

> an act which *deliberately or willfully* violates the employer's rules, *deliberately or willfully* threatens or violates the employer's interests, shows a *repeated disregard*

> for the employee's obligation to the employer, or *disregards* standards of behavior which an employer has a right to expect of its employee.

7 DCMR § 312.3 (Add. 2) (emphases added). This court has adopted a narrow reading of the term "disregard" in this regulation as requiring some form of intent, deliberateness, or willfulness, for three reasons. First, looking at the language of the regulation as a whole, this court concluded that the term "disregards" carried with it the prior modifier of "deliberately or willfully." *Larry v. Nat'l Rehab. Hosp.*, 973 A.2d 180, 183, 184 (D.C. 2009) (reversing gross misconduct determination because ALJ failed to make any finding regarding whether claimant's absence from work "was a deliberate and willful act"). Second, reading the regulation in this manner furthers the requirement that the unemployment insurance "statute is to be construed broadly to accomplish the legislative and statutory intent of minimizing the economic burden of unemployment." *Id*. at 184. And third, the regulatory examples of gross misconduct within § 312.4 (Add. 2-3)[2] "strongly imply" that the term "disregard" in § 312.3 "carries with it the same requirement [of intentionality]" included within the companion terms deliberate and willful. *Capitol Entm't*, 25 A.3d at 23-24. For all of these reasons, this court has held that "an

[2] Those examples are:
a. Sabotage;
b. Unprovoked assault or threats;
c. Arson;
d. Theft or attempted theft;
e. Dishonesty;
f. Insubordination;
g. Repeated disregard of reasonable orders;
h. Intoxication, the use of or impairment by an alcoholic beverage, controlled substance, or other intoxicant;
i. Use or possession of a controlled substance;
j. Willful destruction of property;
k. Repeated absence or tardiness following warning.

employee's actions must be intentional, deliberate, or willful . . . ." in order to amount to gross misconduct. *Id.* at 24.[3]

b. The ALJ's factual findings that Ms. Lynch unintentionally left her gun in the restroom are supported by substantial evidence and preclude a finding of gross misconduct.

The ALJ's findings of fact unambiguously state that Ms. Lynch acted unintentionally when she left her handgun in the women's bathroom. *See* Order at 6 (App. A20) ("[t]here is nothing in the record to suggest that [Ms. Lynch] placed her loaded gun on the shelf with the intent to leave it behind"); *id.* at 7 (App. A21) ("[Ms. Lynch] did not notice that [her gun] was missing from her belt"); *see also id.* at 2 (App. A16) ("Claimant was worried" about her ailing mother); *id.* at 3 (App. A17) ("Claimant stated that she was distracted by worry about her mother's health."). These findings are amply supported by the record and are entitled to deference on appellate review. *See Rodriguez v. Filene's Basement, Inc.*, 905 A.2d 177, 180 (D.C. 2006).

Such unintentional conduct cannot meet the explicit mental state required for gross misconduct under the regulations and this court's precedents. 7 DCMR § 312.3 (Add. 2); *see, e.g.*, *Capitol Entm't*, 25 A.3d at 24. Unintentional conduct cannot constitute gross misconduct because it is not "willful," "deliberate," or "intentional." *Bowman-Cook*, 16 A.3d at 135 (reversing determination of gross misconduct because ALJ had failed to determine whether

[3] Intentional, deliberate, or willful conduct is *necessary* but not *sufficient* for a determination of gross misconduct. *See Scott v. Behavioral Research Assocs., Inc.*, 43 A.3d 925, 931 (D.C. 2012). Conduct that meets these criteria but is also mitigated in certain respects is only simple (not gross) misconduct. *Odeniran v. Hanley Wood, LLC*, 985 A.2d 421, 426 (D.C. 2009) (finding that an *intentional* failure to work productively on a single day, in the absence of any proof of harm to the employer, constituted simple misconduct); *see* 7 DCMR § 312.5 (Add. 3) ("Simple misconduct encompasses those acts where the severity, degree, or other mitigating circumstances do not support a finding of gross misconduct.").

claimant acted "intentionally" in failing to receive letters); s*ee also* BLACK'S LAW DICTIONARY 1737 (9th ed. 2009) (defining willful as "[v]oluntary and intentional, but not necessarily malicious"); *id.* at 492 (defining deliberate as "[i]ntentional; pre-meditated; fully considered"). It is striking that the ALJ found gross misconduct here, not only without any express finding of willfulness, deliberateness, or intent, as is required, but while expressly finding that there "is nothing in the record to suggest that [Ms. Lynch] placed her loaded gun on the shelf with the intent to leave it behind." Order at 6 (App. A20); *accord id.* (finding "a lack of intentionality"); Order at 7 (App. A21) (Ms. Lynch's actions were "not malicious or intentional"). Reversal is required on this basis alone.

II. Ms. Lynch's single, unintentional act does not meet the requirements for simple misconduct because it evidenced neither intentionality nor the equivalent of intentionality.

Unlike gross misconduct, the unemployment regulations do not describe the mental state required for simple misconduct.[4] This court has filled that gap with a number of decisions making clear that simple misconduct does not exist absent intent or its equivalent. *See, e.g.*, *Scott v. Behavioral Research Assocs., Inc.*, 43 A.3d 925, 931 (D.C. 2012) (holding that simple misconduct requires "intentionality or its equivalent (*e.g.*, conscious indifference to, or reckless disregard of, the employee's obligations or the employer's interest)") (citing *Hamilton v. Hojeij Branded Food, Inc.*, 41 A.3d 464, 475 (D.C. 2012)).

[4] The regulations define simple misconduct as "an act or omission by an employee which constitutes a breach of the employee's duties or obligations to the employer, a breach of the employment agreement or contract, or which adversely affects a material employer interest." 7 DCMR § 312.5 (Add. 3). For example, simple misconduct "shall include those acts where the severity, degree, or other mitigating circumstances do not support a finding of gross misconduct." *Id.*

Section I, above, notes that the ALJ correctly and repeatedly stated that Ms. Lynch acted without intent. Thus, Ms. Lynch could not have committed simple misconduct unless she acted with the equivalent of intentionality. She did not do so as a matter of law.

This court has never found misconduct based on a mental state "equivalent" to intentionality, so the precise outlines of this doctrine are somewhat unclear. However, the court has explained this concept sufficiently to determine that Ms. Lynch did not have a mental state equivalent to intentionality as is required for simple misconduct.

First, this court has held that ordinary negligence does not indicate the equivalent of intentionality and cannot result in a finding of misconduct. *E.g.*, *Capitol Entm't*, 25 A.3d at 25 (holding that "ordinary negligence or an honest mistake in judgment will not suffice as a basis of disqualification for misconduct"); *id.* at 26 ("It is one thing to say that an employee forfeits entitlement to unemployment benefits for intentional disobedience; it is quite another to say that an employee fired for unintentional incompetence does so."). In the non-unemployment context, this court has determined that "'bona fide forgetfulness of facts'" – which is what unquestionably happened here when Ms. Lynch forgot that she had placed her gun on the stall shelf – is ordinary "negligence." *Ass'n of Am. R.Rs. v. Connerton*, 723 A.2d 858, 862 (D.C. 1999) (quoting *Strauss v. Hensey*, 9 App. D.C. 541, 547-48 (1896), and holding a payment made based on a fact once known but forgotten is a payment based on a mistake of fact). Accordingly, Ms. Lynch committed only ordinary negligence, which can never constitute misconduct (simple or otherwise).

Second, while using a variety of formulations to describe the kinds of recklessness or gross negligence that can demonstrate the equivalent of intent for these purposes, this court has made clear that the equivalence of intent can be found only where a highly culpable mental state

can be inferred based on the known facts. *See, e.g.*, *Capitol Entm't*, 25 A.3d at 25 n.36 (citing *District of Columbia v. Walker*, 689 A.2d 40, 44-45 (D.C. 1997)). For example, in the previous appeal relating to Ms. Lynch, this court stated that this mental state includes:

> negligence in such a degree or recurrence as to manifest *culpability, wrongful intent, or evil design*, or [the] show[ing] [of] an *intentional and substantial disregard* of the employer's interest or of the employee's duties and obligations to the employer. This type of negligence, referred to as gross negligence or reckless disregard of the consequences, … is typified by *highly unreasonable conduct, involving an extreme departure from ordinary care*, in a situation where a high degree of danger is apparent. This court has also declared that [t]he term gross negligence requires such an *extreme deviation from the ordinary standard of care* as to support a finding of *wanton, willful and reckless disregard* or *conscious indifference* for the rights and safety of others.

Lynch, 93 A.3d at 675-76 (citing *Capitol Entm't*, 25 A.3d at 28) (other internal quotations and citations omitted) (emphases added). As noted above, when Ms. Lynch forgot about her gun, she was negligent, but not in a manner or under such circumstances as to demonstrate anything like culpability, wrongful intent, evil design, wantonness, willfulness, reckless disregard, or conscious indifference. All of these states of mind require some kind of *conscious* action rather than simply forgetting to do the right thing, as happened here. *See* Order at 7 (App. A21) ("[Ms. Lynch] did not notice that [her gun] was missing from her belt.").

In this context, the ALJ erred in applying the word "reckless" to Ms. Lynch's conduct. *See* Order at 7 (App. A21). Recklessness requires a "'*conscious* choice of a course of action.'" *In re Romansky*, 825 A.2d 311, 316 (D.C. 2003) (quoting 57 Am. Jur. 2d Negligence § 302) (emphasis added); *accord id.* ("recklessness is a 'state of mind in which a person does not care about the consequences of his or her action'") (quoting Black's Law Dictionary 1277 (7th ed. 1999)). The Restatement notes that recklessness:

> differs from that form of negligence which consists of mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless

> misconduct requires *a conscious choice of a course of action*, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man.

Restatement (Second) of Torts § 500, comm. (g) (1965) (emphasis added); *see Copeland v. Baltimore & O. R. Co.*, 416 A.2d 1, 3 (D.C. 1980) (citing the Restatement). In other words, for an act to be reckless, although there need not be intent to cause harmful consequences, there must be intent to commit an underlying act and that act must create a high risk of harmful consequences. Restatement (Second) of Torts § 500, comm. (b) & (f) (1965). There was no intent to leave the gun in the stall here and therefore no recklessness.

The ALJ similarly erred in finding Ms. Lynch's conduct grossly negligent. *See* Order at 1 (App. A15). On remand, the ALJ was directed to consider whether Ms. Lynch's leaving of her gun in the restroom "is the kind of gross negligence that we have equated with intentionality due to the serious harm that could ensue, that is, whether the stated act constitutes [1] 'highly unreasonable conduct, involving an extreme departure from ordinary care, [2] in a situation where a high degree of danger is apparent.'" *Lynch*, 93 A.3d at 677 (bracketed numerals added). This court clarified with respect to the "extreme departure from ordinary care" prong of this standard that "gross negligence requires such an extreme deviation from the ordinary standard of care as to support a finding of wanton, willful and reckless disregard or conscious indifference for the rights and safety of others." *Id.* at 676-77 (citing *Capitol Entm't*, 25 A.3d at 28 n.36, which, in turn, quoted *District of Columbia v. Walker*, 689 A.2d 40, 44-45 (D.C. 1997)).

The first prong of this test is not met because no such extreme departure exists here. Ms. Lynch forgot something very important – her gun – because she was distracted by worry about her mother. This was a mistake, but not an extreme one under the applicable legal standard, because it is not sufficient to "support a finding of wanton, willful and reckless disregard or

conscious indifference for the rights and safety of others." *Lynch*, 93 A.3d at 675-76. People forget things – even important things – with great frequency. Indeed, here, there is evidence that one of Ms. Lynch's coworkers also left her loaded gun in the restroom. Order at 2 (App. A16); *see* Tr. 23-24 (App. A26-27). This is far from ideal. It often results in negligence and, occasionally, dangerous situations. It may result in actions for which an employee may properly be terminated.

However, forgetting something important is not the kind of extreme departure from ordinary care that constitutes gross negligence in this context. In short, "[t]here is simply no logical way around the fact that if one does not perform a required act because the requirement is innocently or negligently erased from one's consciousness for a time, the person 'forgets' in common parlance, negligently or without culpability." *Hosley v. Knipp*, 2014 U.S. Dist. LEXIS 94681 at *29 (E.D. Cal. Jul. 10, 2014); *see also Gonzalez v. Duncan*, 551 F.3d 875, 886 n.10 (9th Cir. 2008) (forgetting to register as a sex offender is "ordinary negligence"); *Montalvo v. Williams*, 1998 U.S. App. LEXIS 39036 at *3 (5th Cir. Nov. 20, 1998) (forgetting to give diabetic insulin injections was "merely negligent"); *Luck v. Fox*, 2009 U.S. Dist. LEXIS 36491, at *13 n.3 (E.D. Va. Apr. 28, 2009) (*Bivens* case noting that nurse's alleged three-day failure to order staph infection victim's antibiotics "because she forgot is at worst simple negligence, not 'gross' negligence"). This is especially true here, where there is a reasonable explanation for Ms. Lynch's forgetfulness, namely her concerns regarding her mother's health, and that explanation belies any assertion of wantonness, willfulness, reckless disregard, or conscious indifference.

The ALJ erred as a matter of law in her analysis of gross negligence by conflating this court's two distinct factors (extreme departure from ordinary care, on the one hand, and high degree of danger, on the other). The ALJ simply concluded that Ms. Lynch's conduct met the

first prong of this standard (that Ms. Lynch's conduct was "sufficiently egregious to require a finding of gross misconduct") *because* her conduct met the second prong of this standard (that the conduct was "highly dangerous"). Order at 7 (App. A21). This reasoning is improper because it effectively omits half of this court's two-part test.

Ms. Lynch does not deny that her regrettable actions meet the *second* prong of the test for gross negligence in that they created a high degree of danger. But that fact does not render the *first* prong of the test irrelevant. To the contrary, this court's decisions make clear that dangerousness alone cannot support a finding of gross negligence or of simple misconduct. In *Capitol Entertainment v. McCormick*, a bus driver was terminated after two accidents resulting from her ordinary negligence, yet this court held that the driver qualified for full unemployment benefits. 25 A.3d at 21-22, 29. This court acknowledged that safety is a "paramount concern" in the workplace, but neither simple nor gross misconduct was proven because the employer presented "no evidence that [claimant] was *indifferent* to safety or that she violated the rules of safe bus operation *deliberately or consciously*." *Id.* at 28 (emphasis added). A second case, *Keep v. District of Columbia Dep't of Employment Servs.*, 461 A.2d 461, 463 (D.C. 1983), involved even more disturbing and dangerous conduct. There, a babysitter was terminated for allowing a small child to chew on wire garbage ties and for neglecting to strap the child into a stroller, among other incidents. This court again provided unemployment insurance benefits because the conduct, although patently dangerous, was unintentional and not "sufficiently willful to meet the statutory definition of misconduct." *Id.* The situation is similar here, where Ms. Lynch created a dangerous situation, but did so without any kind of intent, wilfulness, malice, or other similarly culpable mental state. Order at 6 (App. A20) (finding Ms. Lynch's conduct

lacked "recurrence or evil design . . ."); *id.* at 7 (App. A21) (describing Ms. Lynch's conduct as "not malicious or intentional"). She was distracted about her mother's health, and she forgot.

Accordingly, no misconduct can be found here, and the ALJ's contrary determination should be reversed and the case remanded with instructions to find Ms. Lynch eligible for unemployment insurance benefits.

CONCLUSION

Based on the foregoing, Ms. Lynch, through her undersigned counsel, respectfully requests that this court reverse the ALJ's legal conclusion of gross misconduct and remand with instructions to find that she is qualified for full benefits.

Respectfully submitted,

Drake Hagner (No. 1004674)
Jonathan Levy (No. 449274)
Legal Aid Society of the District of Columbia
1331 H Street, N.W., Suite 350
Washington, DC 20005
Telephone: 202 628-1161
Fax: 202 727-2132
Counsel for Petitioner Jacqueline Lynch

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief of Petitioner to be delivered by first-class mail, postage prepaid, the 24th day of March, 2015, to

Edward R. Noonan, Esq.
Jeffrey P. Brundage, Esq.
Eckert Seamans Cherin
1717 Pennsylvania Ave, NW - #1200
Washington, DC 20006
Counsel for Respondent Masters Security

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Drake Hagner

ADDENDUM OF STATUTES & REGULATIONS

Division VIII. General Laws.
Title 51. Social Security.
Chapter 1. Unemployment Compensation.
Subchapter I. General.
Part A. Administration of The District Unemployment Fund.

D.C. Code § 51-110 (2015)

§ 51-110. Disqualification for benefits.

(a) For weeks commencing after March 15, 1983, any individual who left his most recent work voluntarily without good cause connected with the work, as determined under duly prescribed regulations, shall not be eligible for benefits until he has been employed in each of 10 subsequent weeks (whether or not consecutive) and, notwithstanding *§ 51-101*, has earned wages from employment as defined by this subchapter equal to not less than 10 times the weekly benefit amount to which he would be entitled pursuant to *§ 51-107(b)*.

(b) (1) For weeks commencing after January 3, 1993, any individual who has been discharged for gross misconduct occurring in his most recent work, as determined by duly prescribed regulations, shall not be eligible for benefits until he has been employed in each of 10 successive weeks (whether or not consecutive) and, notwithstanding *§ 51-101*, has earned wages from employment as defined by this subchapter equal to not less than 10 times the weekly benefit amount to which he would be entitled pursuant to *§ 51-107(b)*.

(2) For weeks commencing after January 3, 1993, any individual who is discharged for misconduct, other than gross misconduct, occurring in the individual's most recent work, as defined by duly prescribed regulations, shall not be eligible for benefits for the first 8 weeks otherwise payable to the individual or until the individual has been employed in each of 8 subsequent weeks (whether or not consecutive) and, notwithstanding *§ 51-101*, has earned wages from employment as defined by this subchapter equal to not less than 8 times the weekly benefit amount to which the individual would have been entitled pursuant to *§ 51-107(b)*. In addition, such individual's total benefit amount shall be reduced by a sum equal to 8 times the individual's weekly benefit amount.

(3) The District of Columbia Unemployment Compensation Board shall add to its rules and regulations specific examples of behavior that constitute misconduct within the meaning of this subsection.

TITLE 7. EMPLOYMENT BENEFITS
CHAPTER 3. UNEMPLOYMENT COMPENSATION

CDCR 7-312 (2015)

7-312. MISCONDUCT.

312.1 Pursuant to § 10(b) of the Act, the Director shall disqualify for benefits any individual discharged for misconduct occurring in his/her most recent work. The nature of the disqualification shall be in accordance with § 10(b) (1) or § 10(b) (2) of the Act as defined in § 312.3, § 312.4, § 312.5 and § 312.6 of this section.

312.2 The party alleging misconduct shall have the responsibility to present evidence sufficient to support a finding of misconduct by the Director.

312.3 For purposes of § 10(b) (1) of the Act, the term "gross misconduct" shall mean an act which deliberately or willfully violates the employer's rules, deliberately or willfully threatens or violates the employer's interests, shows a repeated disregard for the employee's obligation to the employer, or disregards standards of behavior which an employer has a right to expect of its employee.

312.4 Gross misconduct may include, but is not limited to the following:

a. Sabotage;

b. Unprovoked assault or threats;

c. Arson;

d. Theft or attempted theft;

e. Dishonesty;

f. Insubordination;

g. Repeated disregard of reasonable orders;

h. Intoxication, the use of or impairment by an alcoholic beverage, controlled substance, or other intoxicant;

i. Use or possession of a controlled substance;

j. Willful destruction of property;

k. Repeated absence or tardiness following warning.

312.5 For purposes of § 10(b) (2) of the Act, the term "other than gross misconduct" shall mean an act or omission by an employee which constitutes a breach of the employee's duties or obligations to the employer, a breach of the employment agreement or contract, or which adversely affects a material employer interest. The term "other than gross misconduct" shall include those acts where the severity, degree, or other mitigating circumstances do not support a finding of gross misconduct.

312.6 Other than gross misconduct may include, but is not limited to the following:

a. Minor violations of employer rules;

b. Conducting unauthorized personal activities during business hours;

c. Absence or tardiness where the number of instances or their proximity in time does not rise to the level of gross misconduct;

d. Inappropriate use of profane or abusive language.

312.7 If a violation of the employer's rules is the basis for a disqualification from benefits pursuant to § 10(b) (1) or § 10(b) (2) the Act, the Director shall determine the following:

(a) That the existence of the employer's rule was known to the employee:

(b) That the employer's rule is reasonable; and

(c) That the employer's rule is consistently enforced by the employer.

312.8 In an appeal hearing, no misconduct shall be presumed. The absence of facts which affirmatively establish misconduct shall relieve a claimant from offering evidence on the issue of misconduct.

312.9 In an appeal hearing, the persons who supplied the answers to questionnaires or issued other statements alleging misconduct shall be present and available for questioning by the adverse party.

312.10 In an appeal hearing, prior statements or written documents, in the absence of other reliable corroborating evidence, shall not constitute evidence sufficient to support a finding of misconduct by the Director.

STATUTORY AUTHORITY: Unless otherwise noted, the authority for this chapter is D.C. Code §§ 46-105, -114

SOURCE: In effect as of January 1986; as amended by: Final Rulemaking published at (June 24, 1994).